Gary Eisenberg (NJ Bar No. 58613)
PERKINS COIE LLP
30 Rockefeller Plaza, 22nd Floor
New York, New York 10112-0015
Telephone: 212.262.6900
Facsimile: 212.977.1649
GEisenberg@perkinscoie.com
DocketPHX@perkinscoie.com

Attorneys for Plaintiff
HQ13-1 Atlantic Ocean LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

HQ13-1 Atlantic Ocean LLC, a Delaware limited liability company Plaintiff, v. Tutor Perini Building Corporation, an Arizona corporation; Oldcastle BuildingEnvelope, Inc., a Delaware corporation; Oldcastle BuildingEnvelope Canada, Inc., a Canadian corporation; Trulite Industries Limited, a Canadian corporation; Trulite Glass & Aluminum Solutions Canada, ULC, a Canadian corporation, and Trulite Glass & Aluminum Solutions LLC, a Delaware limited liability company Defendants.	No. COMPLAINT **[Jury Trial Demanded]**

Plaintiff HQ13-1 Atlantic Ocean LLC (hereafter "Plaintiff"), 1 Atlantic Ocean, Atlantic City, New Jersey, a Delaware limited liability company, for causes of action against the following defendants: Tutor Perini Building Corporation, an Arizona corporation, 15901 Olden Street, Sylmar, California; Oldcastle BuildingEnvelope, Inc., a

Delaware corporation, 900 Ashwood Parkway, Suite 600, Atlanta, GA; Oldcastle BuildingEnvelope Canada, Inc., a Canadian corporation, 210 Great Gulf Drive, Thornhill, ONT, Canada; Trulite Industries Limited, a Canadian corporation, 275 Orenda Road, Brampton, ONT, Canada; Trulite Glass & Aluminum Solutions Canada, ULC, a Canadian corporation, 20 Royal Group Crescent, Vaughan, ONT, Canada; and Trulite Glass & Aluminum Solutions LLC, a Delaware limited liability company, 10200 NW 67th Street, Tamarac, Florida (collectively, "Defendants"), alleges as follows:

THE PARTIES

1. Plaintiff is a Delaware limited liability company whose sole member is U.S. Bank National Association, as Trustee for the registered holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2005-C16. U.S. Bank National Association is a national banking association. Pursuant to 28 U.S.C. § 1348, as interpreted in *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006), the citizenship of U.S. Bank National Association is Ohio, which is designated as its main office in its articles of association.

2. Plaintiff is the assignee of and successor-in-interest to Atlantic Pier Associates, LLC, as successor to Pier Developers, Inc., and as such, Plaintiff holds the ownership interest in the ground lease and all related intangibles, personal property and improvements in the project commonly known as The Pier Shops at Caesars, located in Atlantic City, New Jersey (hereafter, the "Project").

3. Defendant Tutor Perini Building Corporation ("Perini") is an Arizona corporation with its principal place of business in California. Perini contracted with Plaintiff's predecessors-in-interest, Atlantic Pier Associates, LLC and Pier Developers, Inc., to perform certain general contractor and construction manager services for the Project.

4. Defendant Oldcastle BuildingEnvelope, Inc. is a Delaware corporation and, on information and belief, its principal place of business is in Atlanta, Georgia ("Oldcastle I").

5. On information and belief, Defendant Oldcastle BuildingEnvelope Canada, Inc. is a Canadian corporation with its principal place of business in Canada ("Oldcastle II")

6. On information and belief, Oldcastle I and/or Oldcastle II are the successor(s) in interest to Antamex International Inc. ("Antamex"). Antamex subcontracted with Perini to supply and install a glass curtain wall at the Project (the "Curtain Wall").

7. Antamex also made certain warranties to and for the benefit of Plaintiff, including a written warranty set forth in Antamex's subcontract with Perini, and a written warranty issued to the Project Owner that has been assigned to and is now held by Plaintiff. As the successor to Antamex, Oldcastle I and/or Oldcastle II assumed all obligations of Antamex to Perini and to Plaintiff. The term "Oldcastle" as used herein shall refer to Antamex and its successor(s), Oldcastle I and/or Oldcastle II.

8. On information and belief, Defendants Trulite Industries Limited, Trulite Glass & Aluminum Solutions Canada, ULC (Canadian corporations with their principal place of business in Canada), and Trulite Glass & Aluminum Solutions LLC, (a Delaware limited liability company, whose sole member is Trulite Intermediate Holdings, LLC, a Delaware limited liability company, whose sole member is Arch Windows Holding Corp., a Delaware corporation with its principal place of business in Florida) (together, "Trulite") and their predecessors contracted with Antamex (now Oldcastle) to supply certain glass units for the Project for assembly and installation by Antamex for the Project's Curtain Wall. Trulite also issued a written warranty on the glass units that it supplied, which warranty was assigned to and is now held by Plaintiff. On information and belief, Trulite's supply agreement with Antamex may have contained other warranty and contractual obligations that inure to the benefit of, and are enforceable by, Plaintiff and/or Perini.

STATEMENT OF JURISDICTION

9. Jurisdiction in the United States District Court is proper in this case because there is diversity of citizenship between the parties and the amount in controversy, without interest and costs, exceeds the jurisdictional sum specified in 28 U.S.C. § 1332. The estimated damages in this action exceed $5 million.

10. Venue in this Court is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred, and a property that is the subject of the action is situated, at the Project, which is located in Atlantic City, New Jersey.

11. Defendants are subject to personal jurisdiction in New Jersey because they provided services, supplied materials, entered contracts and/or issued warranties with respect to the Project.

12. Plaintiff demands a jury trial on all issues triable by jury in this matter.

THE PROJECT, CONTRACTS AND WARRANTIES

13. Commencing in or about 2003, Perini contracted with Plaintiff's predecessor, Pier Developers Inc., to build the Project pursuant to a Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is also the Constructor, AIA Form A121 Agreement, with certain modifications agreed to by the parties ("Perini Construction Contract"), along with its General Conditions.

14. On information and belief, construction of the Project was ongoing through at least 2007, and possibly thereafter, pursuant to the Perini Construction Contract.

15. Plaintiff is the assignee, and successor in interest to the right, title and interest, of Pier Developers Inc. in the Project and under the Perini Construction Contract.

16. Pursuant to the Perini Construction Contract, Perini made certain warranties and otherwise agreed as follows, among other things:

a. Perini agreed to ensure that "either it or a Subcontractor is responsible for all such portions of the Work, and that all Work is performed in accordance with the Contract Documents and all legal requirements."

b. Perini agreed to "inspect the Work of the Subcontractors at least daily and require the Subcontractors to promptly perform necessary corrections."

c. Perini agreed that it "shall use all reasonable efforts, skill and judgment as a professional Construction Manager to achieve satisfactory performance by the Subcontractors of all of their obligations under the Subcontracts…"

d. Perini agreed that it "shall determine that the Work is being performed in accordance with the requirements of the Contract Documents, and use all reasonable efforts to guard the Owner against defects and deficiencies in the Work."

e. Perini agreed to be "responsible to the Owner for acts and omissions of the Contractors employees, subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor."

f. Perini warranted "that materials and equipment furnished under the Contract will be of good quality and new . . . that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents."

g. Perini agreed that "Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective."

17. The Perini Construction Contract contains provisions requiring mediation before litigation can be commenced. Plaintiff, by written demand dated November 26, 2013, demanded that Perini mediate disputes arising out of the breaches of warranty, construction defects and other actions and omissions that, among other things, give rise to the causes of action asserted by Plaintiff in this Complaint. Perini has failed and

refused to abide by the mediation provisions of the Perini Construction Contract and has otherwise imposed unreasonable demands and conditions on its willingness to participate in mediation. Perini also has refused Plaintiff's reasonable requests for documents and other information regarding the construction of the Project.

18. Any pre-litigation mediation requirement of the Perini Construction Contract has been waived and abandoned by Perini. Further, Perini is estopped by its conduct from insisting on any pre-litigation mediation, thereby entitling Plaintiff to proceed directly to litigation.

19. Oldcastle issued a written warranty covering the Project's Curtain Wall system, in which it promised to "repair or replace defective materials or to repair defective workmanship furnished under this subcontract, all at no cost to the owner." The Oldcastle warranty also incorporated by reference the terms of a separate warranty provided by Trulite.

20. In addition, Oldcastle entered a subcontract with Perini under which it agreed that all Work performed, and materials supplied, under the subcontract would meet the requirements of the Perini Construction Contract, and warranted to the Owner that its Work was free of defects. Oldcastle's subcontract provided, among other things:

a. That Oldcastle "warrants to the Contractor and Owner that . . . all work under this Subcontract shall be of good quality, free from faults and defects and in conformance with the Subcontract Documents."

b. That Oldcastle "shall pay for all changes to the Work resulting from such defects in workmanship or materials and all expenses necessary to replace or repair the Work, including that damaged or disturbed by making replacements or repairs. This guarantee is in addition to all other guarantees, warranties, and rights contained in the Subcontract Documents."

21. Trulite also issued a written warranty for the benefit of Plaintiff, covering the glass units supplied for installation in the Project's Curtain Wall, warranting the glass units against defects for a period of ten years from the date of manufacture.

22. All Defendants knew, at the time they contracted to provide services and/or supply materials for use on the Project, that the Project was developed as a high-end retail and resort property, located on the beach in New Jersey and overlooking the Atlantic Ocean. Defendants also knew, at the time they contracted to provide services or to supply materials for the Curtain Wall system, that unobstructed views and visibility were paramount objectives for the completed Project.

THE PROJECT DEFECTS

23. In approximately spring 2012, Plaintiff noticed that some of the glass units in the Project's Curtain Wall had become visually obstructed by a dark-colored "dripping" material sandwiched between the two layers of glass. The condition worsened over time, with more units developing the dripping condition and the existing drips becoming longer and more noticeable.

24. Based on inspections conducted thereafter by Plaintiff's consultants, it was determined that the polyisobutylene (hereafter, "PIB") sealant material used in the glass units was failing throughout the Project, resulting in "dripping" and migration of the sealant material inside the glass units. (This condition is referred to as the "Curtain Wall Defects").

25. As a result of the defective PIB sealant, the glass units installed in the Project's Curtain Wall system, and the Project's Curtain Wall as a whole, are defective and unfit for their intended use. Among other things, vision through the glass units is materially obstructed. Moreover, because the PIB sealant is the primary sealant in the glass units, its deterioration and failure has materially damaged and impaired the performance and functionality of the Project's Curtain Wall.

26. In July 2013 and thereafter, Plaintiff gave Defendants written and oral notice of the Curtain Wall Defects, including notice that the conditions breached express

and implied warranties provided by Defendants. Plaintiff further demanded that Defendants honor their warranty and other legal and contractual obligations. Plaintiff also provided Defendants with an opportunity to inspect the Curtain Wall.

27. Defendants have failed and refused to honor their warranty and other legal and contractual obligations to address the Curtain Wall Defects.

28. In approximately spring 2013, Plaintiff began to notice that some of the glass railings at the Project had become noticeably loose, and those railings appeared to be moving at the aluminum base. Further inspections in fall 2013 and spring 2014 revealed that numerous glass railing locations were loose and that additional areas were loosening over time. (These conditions are referred to as the "Glass Railing Defects").

29. Destructive testing was performed in one location, revealing that the concrete under the aluminum shoe had been improperly installed and that the bolt attachment was not fully or properly embedded, among other defects.

30. Based on inspections by Plaintiff's engineering consultants, the glass railing system has defects that include, among others, deficiencies in the installation of the anchoring system. As a result, the railing system has loosened in some locations, and it is reasonably anticipated that the loosening will worsen over time. The condition of the glass railings has already worsened noticeably from the time the problem was first discovered in spring 2013.

31. Plaintiff's engineering consultant has recommended a repair of the glass railing system that includes, among other things, installation of a metal bracket to provide additional support and stability.

32. Because the Project's Curtain Wall Defects and Glass Railing Defects were latent in nature, all statutes of limitation were tolled until Plaintiff discovered the defects.

33. There may be other defects at the Project that have not yet been discovered by Plaintiff. Plaintiff's ability to discover and evaluate defects has been impaired by Perini's refusal to provide it with relevant Project documents requested by Plaintiff.

Plaintiff reserves the right to amend this Complaint to identify other latent defects that are identified as discovery in the action progresses.

FIRST CAUSE OF ACTION

(Breach of Contract and Express Warranty--Perini)

34. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations contained in Paragraphs 1 through 33 as if fully set forth herein.

35. By the terms of the Perini Construction Contract and by operation of law, Perini is responsible to Plaintiff for the acts and omissions of the subcontractors and suppliers who provided goods and services for the Project.

36. The Curtain Wall Defects and the Glass Railing Defects breach Perini's contractual obligations and warranties as set forth above, including, without limitation, Perini's obligation to ensure that all Work met the requirements of the Contract Documents and that the Project shall be free of defects.

37. Perini has breached its contractual obligation to participate in pre-litigation mediation of this dispute.

38. Perini has breached its obligation of good faith and fair dealing under the Perini Construction Contract, including, without limitation, by failing and refusing to provide Plaintiff with copies of relevant Project documents and information requested by Plaintiff, by refusing to mediate and by failing and refusing to repair the Project's Curtain Wall Defects and Glass Railing Defects.

39. Plaintiff and its predecessors have fully performed all conditions, covenants and promises required by it to be performed in accordance with the terms of the Perini Construction Contract.

40. Plaintiff has been damaged by Perini's breaches of the Perini Construction Contract. As a proximate result of Perini's breaches, Plaintiff has suffered, and will continue to suffer, damages, including, without limitation, loss of value of the Project and costs of remediation and repair.

SECOND CAUSE OF ACTION

(Breach of Express and Implied Warranties--Trulite and Oldcastle)

41. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations contained in Paragraphs 1 through 40 as if fully set forth herein.

42. Plaintiff is informed and believes that Trulite and Oldcastle are merchants with respect to the manufacture and supply of the glass units used in the Project's Curtain Wall. In addition, Oldcastle performed installation services on the Project under a subcontract with Perini.

43. As product suppliers and/or manufacturers, Trulite and Oldcastle impliedly warranted that the glass curtain wall units supplied for use on the Project were of merchantable quality and free from defects, would pass without objection in the trade, were of even kind and quality free of manufacturing defects, and were fit for the ordinary purposes for which they were supplied for use in the Project's Curtain Wall. *See N.J.S.A.* 12A:2-314(2)(a)-(f).

44. The glass units supplied by Trulite and Oldcastle were not merchantable, in that they had a latent defect in the PIB sealant that has resulted in premature failure of the units. As such, the glass units were not reasonably fit for their ordinary and intended purpose of long-term use in the Project's Curtain Wall.

45. Both Trulite and Oldcastle knew the particular purpose for which the glass units would be used, and that Plaintiff or its predecessors were relying on the skill and judgment of Trulite and Oldcastle to furnish materials that were suitable for use in the Project's Curtain Wall. The glass units were not reasonably fit for their particular and intended use at a high-end resort Project requiring unobstructed views of the Atlantic Ocean and surrounding beach. *See N.J.S.A.* 12A:2-315.

46. Trulite and Oldcastle also made express warranties as discussed in Paragraphs 7, 8 and 19-21 of this Complaint. Among other things, Oldcastle's subcontract warranted to the Owner that its Work would be free from defects and that Oldcastle would pay all necessary repair or replacement expenses.

47. Plaintiff, and its predecessors, relied on the express and implied warranties extended by Trulite and Oldcastle, which warranties became part of the basis of the bargain.

48. The Curtain Wall Defects breach the terms of Oldcastle's and Trulite's express and implied warranties, in that the glass units installed in the Curtain Wall suffered from latent, pervasive and material defects, were not of merchantable quality and were defective and unfit for both their ordinary and their particular purposes for use at the Project.

49. Plaintiff gave both Trulite and Oldcastle timely notice of breach of their respective warranties, which warranties extended to the future performance of the glass units and the Curtain Wall.

50. Trulite and Oldcastle have failed and refused to honor their warranty obligations, including, without limitation, their obligation to repair and replace the Project's Curtain Wall.

51. Plaintiff has been damaged by the breaches of express and implied warranties described in the foregoing paragraphs. As a proximate result of Trulite and Oldcastle's breaches of their express and implied warranties, Plaintiff has suffered, and will continue to suffer, damages, including, without limitation, loss of value of the Project and costs of remediation and repair.

THIRD CAUSE OF ACTION

(Breach of Implied Warranties of Habitability and Workmanship--Perini and Oldcastle)

52. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations contained in Paragraphs 1 through 51 as if fully set forth herein.

53. New Jersey law imposes the implied warranties of habitability and workmanship on contractors and subcontractors of commercial properties.

54. The Glass Curtain Wall Defects and Glass Railing Defects breach the implied warranties of habitability and workmanship.

55. Plaintiff has been damaged by Perini's breach of the implied warranties of habitability and workmanship with respect to the Glass Railing and Curtain Wall Defects.

56. Plaintiff has been damaged by Oldcastle's breach of the implied warranties of habitability and workmanship with respect to the Curtain Wall Defects.

57. As a proximate result of Perini's and Oldcastle's breach of their implied warranties of habitability and workmanship, Plaintiff has suffered, and will continue to suffer, damages, including, without limitation, loss of value of the Project and costs of remediation and repair.

FIFTH CAUSE OF ACTION

(Products Liability--Trulite)

58. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations contained in Paragraphs 1 through 57 as if fully set forth herein.

59. New Jersey's Products Liability Act may apply to Plaintiff's claims against Trulite relating to the supply of defective PIB used in the Project's Curtain Wall, to the extent that Plaintiff is found to have sustained damages to property other than the defective product itself. *See N.J.S.A.* 2A:58C-1 to -11.

60. The glass units supplied by Trulite for the Project were not reasonably fit for their intended purpose because they contained a PIB sealant material that deviated from industry requirements and standards, resulting in premature deterioration, migration and dripping of the sealant material inside the glass units.

61. Trulite is liable to Plaintiff for all damages proximately resulting from the failure of the PIB sealant in its glass units, including, without limitation, the resulting failure of the Project's Curtain Wall system as a whole.

SIXTH CAUSE OF ACTION

(Negligence -- All Defendants)

62. Plaintiff re-alleges and incorporates by reference into this cause of action all allegations contained in Paragraphs 1 through 61 as if fully set forth herein.

63. Perini owed a duty of reasonable care to Plaintiff in connection with the construction, supervision of construction and supply of materials for use on the Project.

64. Trulite and Oldcastle owed a duty of reasonable care to Plaintiff to ensure that suitable glass units were supplied for the Project that had been adequately manufactured and tested to ensure that they were made of non-defective materials.

65. Defendants breached duties of care to Plaintiff by their acts and omissions as alleged in the foregoing paragraphs of the Complaint.

66. As a proximate result of Defendants' negligence, the defective glass units supplied for the Project have failed, resulting in damage to the Project's Curtain Wall, resulting in damages that include, without limitation, loss of value of the Project and costs of remediation and repair.

67. As a proximate result of Perini's negligence with respect to the Glass Railing system, Plaintiff has suffered, and will continue to suffer, damages, including, without limitation, failure of the Project's Glass Railing system, loss of value of the Project and costs of remediation and repair.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth in the prayer.

PRAYER FOR RELIEF

Plaintiff requests entry of judgment against Defendants as follows:

(a) For general and special damages according to proof at the time of trial.

(b) For past and future costs of repairs of Glass Railing Defects and the Curtain Wall Defects;

(c) For diminution of value of the Project according to proof at time of trial.

(d) For consequential damages, including any lost profits and damages for harm to any person or property resulting from Defendants' acts and conduct as alleged herein;

(e) For costs of investigation, analysis, expert and consultant fees expended in connection with evaluating the Glass Railing and Curtain Wall Defects for purposes of determining the nature and extent of the defects and developing a scope of repair.

(f) For costs and attorneys' fees incurred in connection with this dispute as allowed by the parties' contracts or by law; and

(g) For prejudgment interest on all damages as allowed by law.

Dated: March 17, 2014

PERKINS COIE LLP

By s/ Gary Eisenberg

Gary Eisenberg
Perkins Coie LLP
30 Rockefeller Plaza, 22nd Floor
New York, New York 10112-0015

Attorneys for Plaintiff HQ13-1 Atlantic Ocean LLC